

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #00-41**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Application of sales tax to taxpayer's sale of low vision devices and daily living skills supplies.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the Department by the taxpayer. The rulings herein are binding upon the Department and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the Commissioner at any time.

Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling; and a retroactive revocation of the ruling must inure to the taxpayer's detriment.

FACTS

[TAXPAYER] is a group of ophthalmologists and optometrists who provide ophthalmological and optometric services. The taxpayer additionally engages in the sale of items of tangible personal property to its patients.

These various items sold are provided pursuant to prescription in order to assist patients with serious vision deficiencies. The items are listed in a two-page addendum to the

ruling request, which divides them into two categories, “low vision devices” and “daily living skills supplies.” Under the category of low vision devices are magnifiers (further descriptive terms include “hand held”, “illuminated”, “pocket”), binoculars, monoculars, loupe, sunglasses, prism spectacles, and telesensory closed-circuit television.¹ The category of daily living skills supplies include talking devices such as a talking clock, writing guides and instruments, self-threading needles, and Braille writing devices.

These items are only prescribed to those individuals for whom eyeglasses are not sufficient and who need additional help. These items are separately itemized for billing purposes.

QUESTIONS

1. Are the devices described in the ruling request exempt as prosthetics under the provisions of T.C.A. § 67-6-314?
2. Are the devices described in the ruling request subject to the special tax treatment for tangible personal property consumed in the practice of an optometrist, optician, or ophthalmologist’s profession under the provisions of T.C.A. § 67-6-316?

RULINGS

1. The devices listed in the addendum to the ruling request do not qualify as prosthetics under T.C.A. § 67-6-314.
2. Except for the items the dispensing of which is regulated by the Tennessee Optometry Law (T.C.A. § 63-8-101 et seq.), the devices listed in the addendum to the ruling request do not qualify for the tax treatment provided by T.C.A. § 67-6-316. Those items which are classed as “ophthalmic materials” pursuant to the definition of that term in T.C.A. § 63-8-102(9) are subject to the special tax treatment provided by T.C.A. § 67-6-316, and the taxpayer owes sales or use tax on its purchase, but not on its sale of those items.

ANALYSIS

1. Exemption For Prosthetic Devices

The Tennessee sales and use tax, generally, is imposed on any sale or use of tangible personal property. T.C.A. § 67-6-201 contains a strong statement of legislative intent that every sale or use of tangible personal property is a taxable privilege. However, there are a large number of exemptions provided in the statute. In Cape Fear Paging Co. v. Huddleston, 937 S.W.2d 787 (Tenn. 1996), the Tennessee Supreme Court observed that “[p]ursuant to the Retailers' Sales Tax Act, Tenn. Code Ann. § 67-6-101 - § 67-6-712, a tax is imposed upon the business of selling tangible personal property at retail unless

¹ For purposes of the second question ruled upon, a further division of this category, with additional descriptions, will be made in the analysis portion of the ruling.

specifically exempted by statute.” Therefore, unless an exemption statute can be found, the sale or use of tangible personal property is subject to tax. In construing an exemption from the sales and use tax, the statute is strictly construed against the taxpayer with a presumption against the exemption. An exemption from taxation will not be read into a taxing statute by implication. Pan Am World Services, Inc. v. Jackson, 754 S.W.2d 53 (Tenn. 1988). Every presumption is against exemption, and any well founded doubt defeats a claimed exemption. American Cyanamid Company v. Huddleston, 908 S.W.2d 396 (Tenn. App. 1995). Therefore, it will be necessary to review the exemption statute to determine if the items listed in the ruling request fall within the exemption. If an item does not specifically and clearly fall within the exemption, that item is subject to tax.

T.C.A. § 67-6-314 states in pertinent part:

There is exempt from the sales tax imposed by this chapter:

* * *

(5) The sale or repair of prosthetics, orthotics, special molded orthopedic shoes, walkers, crutches, surgical supports of all kinds, and other similarly medical corrective or support appliances and devices. (Emphasis supplied.)

Therefore, simply stated, the question is are the devices in question “prosthetics?” The sales tax statute does not provide a definition of prosthetic. However, the Tennessee Supreme Court, interpreting this statute in Cordis Corp. v. Taylor, 762 S.W.2d 138 (Tenn. 1988), stated “subsection (5) was intended to import generally accepted medical definitions of the terms therein.” Id. at 140. The Cordis court had previously quoted two medical dictionary definitions of “prosthesis,” which follow:

In Stedman's Medical Dictionary, "prosthesis" is defined as "A fabricated substitute for a diseased or missing part of the body, as a limb, tooth, eye or heart valve," In Tabor's Cyclopedic Medical Dictionary, "prosthesis" is defined as:

1. Replacement of a missing part by an artificial substitute, such as an artificial extremity. SEE: Boston Arm. 2. An artificial organ or part. 3. Device to augment performance of a natural function such as a hearing aid. Id. at 139.

From the second-quoted definition, it can be seen that the term “prosthetic” should be interpreted to include not only artificial substitutes for parts of the body but also devices that augment natural functions of the body. The Tennessee Supreme Court has looked to the augmentation aspect of the definition of “prosthetics” in holding that four distinct items were prosthetics and therefore exempt. An implantable cardiac pacemaker, which is implanted in the body and regulates the beating of the heart by electrical stimulation was held to be a prosthetic in Cordis, supra. Also in Cordis, a hydrocephalus valve system, which is a surgically implanted valve system to drain fluid from the brain when the natural valve system is not functioning, was held to be a prosthetic. In Nutritional Support Services, Ltd. v. Taylor, 503 S.W.2d 213 (Tenn. 1991), enteral feeding systems, which consist of pumps, bags, and tubes used to provide nutritional formulas to patients with non-functioning ingestion, were considered exempt as prosthetics. Likewise,

parenteral feeding devices, consisting of tubes and catheters used to inject nutritional fluids directly into the blood stream of patients with non-functioning digestion systems, were held in Nutritional Support Services to be covered by the exemption for prosthetics. For each of the four items reviewed, there are two factors held by all. First, each of the devices is implanted in or connected by tubes to the body of the patient. Second, each of the devices performs or aids in the performance of a bodily function, by either actually performing the function or providing direct stimulation to encourage the proper function.

From the description of the items that are the subject of the ruling request, it is obvious that they are neither implanted in nor connected to the body of the patient. Further, while the devices may assist the visually impaired person in daily activities, they do not directly augment the performance of body function by performing the function for the patient or providing direct stimulation or support in performing the function. With respect to the class of devices designated "daily living skills supplies," the function provided by the devices is not even the function in which the patient is deficient. For example, a writing guide does not impact vision, in that it does not enable the user to see better or more clearly. Finally, the devices clearly do not fall within the narrow definition of "prosthetic" which the Department took prior to the holdings in Cordis and Nutritional Support Services, as none of the items are a substitute body part. Therefore the items listed in the ruling request should not be construed as prosthetic devices for purpose of the tax exemption.

As explained in the following section of this ruling, the tax treatment of some of the items that are the subject of this ruling is governed by T.C.A. § 67-6-316. It might be argued that the enactment of the exemption for prosthetics is applicable to those items that are the subject of T.C.A. § 67-6-316. If so, in effect, the enactment of the exemption for prosthetics would be an implied repeal of T.C.A. § 67-6-316. It is recognized that it is possible for a statute to be repealed by implication, without being specifically mentioned in a legislative enactment. In Oliver v. King, 612 S.W.2d 152 (Tenn. 1981), the Tennessee Supreme Court stated:

Repeals of statutes by implication are not favored and there must be an irreconcilable conflict or repugnancy between the latter statute and the earlier statute that is plain and unavoidable to work a suspension of an earlier statute. [Citations omitted.] Id. at 154.

Further guidance is found in State v. Moore, 722 S.W.2d 367 (Tenn. 1986), where the Court observed:

Furthermore, a repeal or amendment "by implication is indicated . . . only when two statutes are manifestly repugnant or in irreconcilable conflict of substance; however, such repugnance or conflict will not be found where any fair and reasonable construction will permit the statutes to stand together." Metropolitan Government of Nashville v. Hillsboro Land Co., Inc., supra, 222 Tenn. at 440, 436 S.W.2d at 854. Id. at 374.

The tax treatment for items dispensed by optical professionals, T.C.A. § 67-6-316, has its origin in Ch. 689, Pub. Acts 1976. T.C.A. § 67-6-314, the exemption for prosthetics, is

of later origin. Ch. 330, Pub. Acts 1979 provided an exemption for artificial limbs (the present subsection (1) of T.C.A. § 67-6-314). The term “prosthetics” was added to the exemption by Ch. 634, Pub. Acts 1982, which enacted the remaining subsections. Arguably, the General Assembly could have intended to apply the exemption for prosthetics to items dispensed by optical professionals, and repealed by implication the exemption now found in T.C.A. § 67-6-316. However, it must be assumed that the General Assembly was aware of the state of the law at the time of the enactment of the exemption for prosthetics, and did not see fit to repeal the special tax treatment applicable to optical professionals. Therefore, it is likely the General Assembly intended for the tax status of prosthetics to be controlled by one statute and that for items dispensed by optical professionals to be controlled by the other statute. It is highly unlikely that the items that are the subject of the ruling request, and are not subject to the special treatment of T.C.A. § 67-6-316, were intended to be treated as prosthetics.

2. Tax Treatment for Property Used by Optometrists, Opticians or Ophthalmologists

A. In General

The ruling request states that the taxpayer is seeking clarification of the prosthetic device exemption of T.C.A. § 67-6-314, viewed in light of T.C.A. § 67-6-316. While the ruling request does not explicitly indicate that the taxpayer desires a ruling on whether T.C.A. § 67-6-316 is applicable to the devices which are the subject of the ruling request, the applicability of that section should be reviewed in order to provide a complete ruling on applicability of the sales tax to the devices in question.

The portion of T.C.A. § 67-6-316 applicable to ophthalmologists and optometrists states:

- (a) An optometrist, optician or ophthalmologist shall be considered the user and consumer of the tangible personal property used in the practice of the optometrist's, optician's or ophthalmologist's profession, and the tax levied under this chapter is not applicable to all or any part of the charge made by such persons to their patients.
- (b) All sales of tangible personal property and taxable services to an optometrist, optician or ophthalmologist are subject to the sales or use tax. (Emphasis supplied.)

First, the optometrist, optician, or ophthalmologist is liable for the tax on the tangible personal property used in the practice of his profession, and, second, the optometrist or ophthalmologist is not liable for the sales tax on charges made to his patient, including specific charges for the any property dispensed in that practice. This partial exemption is separate and apart from the exemption for prosthetic devices. The dispensing of most of the devices which are the subject of the ruling request is not regulated by the statutes under which the professions are regulated, T.C.A. § 63-8-101 *et seq.* (the Tennessee Optometry Law, governing optometrists) and T.C.A. § 63-14-101 *et seq.* (which governs dispensing opticians).² In particular, with the exception of spectacles, glasses, and other

² Tennessee law does not provide for regulation of ophthalmologists separate and apart from other physicians. “Ophthalmologist” is defined as “a physician that specializes in ophthalmology.” Webster’s

items “used before or upon the eye” the devices do not appear to be encompassed by the definition of “ophthalmic materials” found in T.C.A. § 63-8-102(9).³ The devices, other than lenses and prisms, do not appear in T.C.A. § 63-8-102(12), which describes the “practice of optometry as a profession.” No statute limiting the dispensing of these devices to professionals has been located, and the ruling request does not point out any such limitation. Therefore, with the exception of the items the dispensing of which is regulated by the Tennessee Optometry Law (see further discussion below), the tax treatment of T.C.A. § 67-6-316 does not apply to the items that are the subject of the ruling request. Thus, the sale of the items which are not “ophthalmic materials” under the optometry law are fully subject to the sales tax.

B. Spectacles, Lenses, and Prisms

There are a few items in the addendum to the ruling request described as spectacles and glasses. These items appear to be items that are within the definition of “ophthalmic materials” found in the Tennessee Optometry Law at T.C.A. § 63-8-102(9), which follows:

"Ophthalmic materials" means any lens which has a spherical, cylindrical or prismatic power or value used before or upon the eye and any frame or other appliance used for the purpose of holding or positioning any ophthalmic lenses before the eyes;

Spectacles, eyeglasses, and the like are worn directly before the patient’s eye or eyes, and such items obviously are among the items contemplated in the above-quoted definition. The prescribing of lenses and prisms and the adjusting or fitting of lenses, prisms, eyeglasses, and spectacles are within the definition of “practice of optometry as a profession found in T.C.A. § 63-8-102(12). Only those particular items are covered by the tax treatment of T.C.A. § 67-6-316. Therefore, sales or use tax would apply to the taxpayer’s purchase of those specific items for dispensing in the taxpayer’s practice of optometry or ophthalmology. No sales tax would be due on their sale to the taxpayer’s patient.

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APPROVED: Ruth E. Johnson
Commissioner

DATE: 10/5/00

Ninth New Collegiate Dictionary, 1987. “Ophthalmology” is defined as “a branch of medical science dealing with the structure, functions, and diseases of the eye. Id. The Tennessee Optometry Law clearly permits the dispensing of eyeglasses, contact lenses, etc. by ophthalmologists as well as optometrists. T.C.A. §63-8-114 states in pertinent part “Nothing in this chapter shall be construed: (1) As applying to medical doctors and doctors of osteopathic medicine lawfully entitled to practice their profession in this state.”

³ T.C.A. §63-8-102(9) is quoted later in the body of this ruling. The Tennessee Optometry Law regulates the practice of optometry and the dispensing of “ophthalmic materials.”